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7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
9 AT SEATTLE

10 COLLEGE REPUBLICANS OF THE
11 UNIVERSITY OF WASHINGTON; et al.,

12 Plaintiffs,

13 vs.

14 ANA MARI CAUCE, in her official capacity
15 as president of the University of
16 Washington; et al.,

17 Defendants.

NO. 2:18-cv-00189-MJP

PLAINTIFFS' REPLY TO OPPOSITION
RE: MOTION FOR PRELIMINARY
INJUNCTION

Note on Motion Calendar:
March 20, 2018

Judge: Hon. Marsha J. Pechman
Date: April 17, 2018
Time: 10:00 a.m.
Crtrm.: Suite 14206, United States
Courthouse, 700 Stewart
Street, Seattle, WA 98101-
9906

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INTRODUCTION

The inconsonant headline of a recent *Wall Street Journal* editorial supporting the TRO in this case – “Free Speech Gets Expensive”¹ – aptly and concisely encapsulates the issue here: Whether the University of Washington (“UW”) unconstitutionally discriminates against campus student groups by charging them onerously high “enhanced security fees” based on their estimate of the public response to the content of the groups’ free speech events and the number of police necessary to meet that response. Or, as the Court summarized it at the TRO stage, “whether the First Amendment allows the UW to seek reimbursement from the College Republicans based upon the criteria set forth in its Security Fee Policy.” Dkt. No. 19 at 3.

UW contends that the entire campus is a limited public forum and that its policies and practices are reasonable and viewpoint neutral. Yet nowhere in its opposition argument has it addressed the practical fallacy of its position: Where only one side of a political debate seeks to undermine and suppress the other side’s expressive rights, it is manifestly inequitable to burden the victim of such an ideological scheme with financial responsibility for the criminal actions of others.

Plaintiffs will respond to the insufficiency of Defendants’ factual summary and the fallibility of their legal analysis in order. **First**, Red Square is at minimum a designated public forum, but more likely a traditional public forum, as a federal district

¹ The Editorial Board, “Free Speech Gets Expensive,” *The Wall Street Journal* (February 9, 2018), <https://www.wsj.com/articles/free-speech-gets-expensive-1518221133>.

1 court that has surveyed relevant legal authority might posit. **Second**, even if Red Square
2 were found to be a limited public forum, UW's assessment of enhanced security fees is
3 manifestly unreasonable because it is not definite and objective in that the fee assessed
4 depends on UW's measure of the amount of hostility likely to be created by speech
5 based on its content and is therefore viewpoint-based. The policy's unreasonableness is
6 manifestly so because (a) the fee assessment is so large as to be prohibitive and thus
7 would prevent more speech than the policy is intended to prevent, and (b) it favors
8 groups whose ideological opponents do not seek to undermine and suppress their
9 expressive rights while disfavoring groups whose ideological opponents seek to
10 undermine and suppress their expressive rights. As such, the security fee policy ratifies
11 the unlawful actions of the "hostile mob" by marginalizing and inhibiting protected
12 speech and therefore qualifies as a heckler's veto.
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16 In addition to their hearsay and relevancy deficiencies (see Objections to
17 Evidence submitted with this Reply), Defendants' evidence is insufficient to satisfy their
18 burden of establishing that Red Square is a limited public forum, and that Plaintiffs
19 should be held responsible for enhanced security fees.
20

21 **ARGUMENT**

22 **Plaintiffs Have Established Their Right To A Preliminary Injunction**

23 **A. Red Square Is Not A Limited Public Forum When The University Invites Or** 24 **Welcomes The General Public To Attend Events Held There**

25 UW insists that it is entitled to classify Red Square as a limited public forum
26 regardless of how it is used. Whether a large government property like a university
27

1 campus with its streets, sidewalks and plazas, must be constrained by such a rigidly
2 narrow view is not clearly established within the Ninth Circuit. Fora are classified on
3 the basis of their (traditional, designated, limited) use, not on the basis of ipse dixit. “The
4 government does not create a designated public forum through inaction or by
5 permitting only limited discourse.” *Seattle Mideast Awareness Campaign v. King County*,
6 781 F.3d 489, 497 (9th Cir. 2015), citing *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*,
7 473 U.S. 788, 802 (1985). “Instead, the government must intend to grant ‘general access’
8 to its property for expressive use, either by the general public or by a particular class of
9 speakers.” *Id.*, citing *Arkansas Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 679 (1998);
10 see also *Widmar v. Vincent*, 454 U.S. 263, 267–68 (1981) (designated public forum created
11 for student groups). “In contrast, when the government intends to grant only ‘selective
12 access,’ by imposing either speaker-based or subject-matter limitations, it has created a
13 limited public forum.” *Forbes*, 523 U.S. at 679; *Cornelius*, 473 U.S. at 806.

17 UW asserts that because only faculty, staff and student organizations may “host”
18 events in campus spaces “like” Red Square,² the space must be “reserved,” and the
19 events are to be populated by university-affiliated persons and their “guests,” courts
20 have classified similar fora as limited. But the facts here show that members of the
21 “general public” – not merely “guests” – are welcome in Red Square. *See, e.g.*, Vinson
22 Decl., ¶ 10(h) at 6 (“On January 20, 2018, a group of protesters were present in Red
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24

25
26 ² UW provides no examples of campus spaces “like” Red Square, nor bothers to
27 substantiate any form of equivalency among campus event venues.

1 Square, unsponsored....").³ Indeed, Plaintiffs' event was open to the general public. *See*,
2 *e.g.*, Dkt. No. 36, Jaross Decl., ¶ 5 (fees based on whether the "general public" is invited),
3 ¶ 7 (College Republicans invited "general public" to attend Patriot Prayer event while
4 Sean King event limited to ticketed students, faculty, and staff with current UW IDs);
5 *see also* Swanson Decl., ¶ 4 (hundreds of protesters showed up uninvited). In fact, the
6 reason why a sizeable number of protesters were anticipated to disrupt the Patriot Rally
7 event was because Red Square was open to use by the general public and no protocols
8 were established limiting attendance at the rally to campus-affiliated persons and their
9 guests. Had UW denied access to the general public and limited access to campus-
10 affiliated persons and their guests, the need for implementing security and safety
11 protocols conceivably could have been significantly reduced or eliminated, saving the
12 University considerable money. *See, e.g.*, Dkt. No. 36, Jaross Decl., ¶ 4 ("While the
13 College Republicans invited the general public to attend the Patriot Prayer event,
14 attendance for the Sean King event was limited to ticketed students, faculty, and staff
15 with current UW IDs.").

16 UW's view that the government's intention is the sole relevant factor in
17 classifying the nature of the forum has been rejected in the Ninth Circuit – specifically
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23 ³ The "group of protesters" Chief Vinson deceptively fails to identify was the radical
24 Marxist Industrial Workers of the World, seemingly endorsing their presence on
25 campus while subtly condemning the College Republicans, a student group entitled to
26 be on campus, for being present at the IWW protest. As explained in greater context
27 below, this is but one glaring example of viewpoint discrimination that leaps out of
Defendants' evidence.

1 in the context of the university setting: In *OSU Student All. v. Ray*, 699 F.3d 1053 (9th Cir.
2 2012), the court commented that:

3 [t]o destroy the designation of a public forum, the government must do more. It
4 must consistently apply a policy specifically designed to maintain a forum as
5 non-public. “[A] general policy of open access does not vanish when the
6 government adopts a specific restriction on speech, because the government's
policy is indicated by its consistent practice....

7 *Id.* at 1063 (quoting *Hays Cnty. Guardian v. Supple*, 969 F.2d 111, 117–18 (5th Cir. 1992))
8 (omitting internal citation); see also *Vegan Outreach, Inc. v. Los Angeles Community College*
9 *Dist.*, CV 10-6525-GW(JCGX), 2013 WL 12233618, at *10 (C.D. Cal. Feb. 7, 2013)(listing
10 cases endorsing the same or similar principle).

11
12 At least one Ninth Circuit decision supports the view that public college
13 campuses are not necessarily one type of forum or another in their entirety. In *Flint v.*
14 *Dennison*, 488 F.3d 816 (9th Cir. 2007), the court’s reading of *Widmar, supra*, led it to reject
15 the same argument UW makes in this case, refusing to defer to “[the University’s]
16 judgment in reasonably regulating speech regardless whether the regulation advances
17 the purpose of the forum the University has provided for speech” as a controlling
18 principle in determining the type of forum created. *Id.*, at 828 (“We do not read the
19 Supreme Court’s cases to require such deference without first scrutinizing more
20 carefully the nature of the student [] forum and the government's interest in limiting
21 speech within that forum.... The Court looked to the nature of the property, explaining
22 that the university in *Widmar* had ‘created a forum generally open for use by student
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1 groups' and therefore the university had 'assumed an obligation to justify its
2 discriminations and exclusions under applicable constitutional norms.'").

3 Similarly in *Desyllas v. Bernstine*, 351 F.3d 934 (9th Cir. 2003), the court
4 acknowledged that it "must first determine the character of the campus areas" in apply
5 forum analysis to locations of a college campus (approved areas for handbill posting).
6

7 UW can limit who attends events in Red Square, even restrict them to campus-
8 affiliated persons and their guests. When, as here, however, it has traditionally made
9 access to Red Square open to the general public, forum analysis ineluctably leads to the
10 conclusion that UW intended to grant general access to Red Square for expressive use
11 by the general public. Accordingly, Red Square is either a traditional public forum open
12 to the general public for expressive use or a designated public forum open to the general
13 public for expressive use under varying circumstances. Without the benefit of
14 discovery, it is premature to determine which classification fits.
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17 B. Assuming, Arguendo, Red Square Is A Limited Public Forum, The Security
18 Fee Policy Is Manifestly Unreasonable

19 **1. The size of the fee (\$17,000 and possibly more) is prohibitively**
20 **expensive for a university student club, as UW well knows, and far**
21 **greater than was charged such clubs in 2017**

22 UW has disclosed statistical evidence of enhanced security fees assessed against
23 student clubs only for year 2017. Dkt. No. 36, Jaross Decl., ¶ 4 (chart). (Historical
24 information from prior years has not been presented but will be sought through
25 discovery.) Nor has UW identified whether the events listed in its chart were held in
26 Red Square or other venues. Nor does the chart explain why protesters from the radical
27

1 Marxist Industrial Workers of the World, a group unaffiliated with the campus
2 community, were authorized to occupy Red Square on January 20, 2018, without an
3 invitation or approval by University sponsors, why they were not invoiced for security.
4
5 See Dkt. No. 38, Vinson Decl., ¶ 10(h) at 6 and Swanson Decl. ¶ 3 (identifying IWW as
6 the group there that day). Nonetheless, it is apparent that the cost of security for the
7 Patriot Rally far exceeded the cost of security for any other known event, at least in
8 2017.⁴ As the Declaration of Chevy Swanson attached to the Motion indicates, neither
9
10 Plaintiff can satisfy such a large expenditure.

11 Because the enhanced security fee policy lends itself too wide deviations from
12 amounts customarily charged student groups, generally targeting groups with
13 conservative ideological interests, it is not narrowly tailored to survive even the lowest
14 level of scrutiny. “Government may not regulate expression in such a manner that a
15 substantial portion of the burden on speech does not serve to advance its goals.” *Berger*
16 *v. City of Seattle*, 569 F.3d 1029, 1085 (9th Cir. 2009). Here, the enhanced security fee
17 policy broadly sweeps within its prohibition any conservative student group event that
18 ideological opponents would try to disrupt or cause to have cancelled because of the
19 message conveyed. See, e.g., Dkt. No. 37-1, Carr Decl., Exh. 1 at 4 (describing opponents
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24 ⁴ UW plays fast and loose with the selective information given. The unsponsored IWW
25 rally is an example of a politically provocative organization being allowed to use Red
26 Square without permission. Discovery and further investigation may turn up additional
27 instances in which outside groups, and even campus community groups, make use of
Red Square without applying for and receiving permission.

1 of the Patriot Prayer rally supporting violence as a method to shut down the Freedom
2 Rally). Although the purpose of enhanced security fees is to provide sufficient police
3 protection when necessary to deter and to respond to threats/acts of violence, groups
4 like the College Republicans will be inhibited from engaging in expressive activity if it
5 is likely to invite a hostile response from violent lawbreakers. The high cost of featuring
6 someone the College Republicans' ideological opponents seek to protest thus results in
7 the cancellation of such events through no fault of the student group.
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10 **2. Enforcement of the enhanced security fee policy in such a way as to**
11 **create a wide disparity of costs based upon the hostile reaction of the**
12 **community to the message of conservative student groups like the**
13 **College Republicans is an unconstitutional heckler's veto**

14 Evidence of the discriminatory process to which the College Republicans were
15 subjected oozes out of UW's evidence supporting their opposition. The evidence of
16 viewpoint discrimination is marked by (1) subtle or deceptive words or phrases
17 indicating the College Republicans are antagonists/provocateurs while the protesters
18 are victims; (2) reliance on left-wing resources; (3) a less than thorough social media
19 investigation; (4) stereotyping of conservatives and more.

20 One example of a deceptive and incomplete narrative reaching into the state of
21 mind of UW's witnesses has briefly been mentioned already. In his declaration,
22 Defendant Vinson describes how UWPD examine "relevant current events expected to
23 influence the amount of security needed for a planned event." Dkt. No. 38, Vinson Decl.,
24 ¶ 10(h) at 6. He states:
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1 On January 20, 2018, a *group of protesters* were [sic] present in Red Square,
2 unsponsored, *commemorating* the shooting of their colleague during the Milo
3 Yiannopoulos event. Members of the College Republicans *chose to set up a table*
4 in Red Square during that event *and interact in a way with members of the*
5 *protest that required UWPD to separate the groups. UWPD expects that*
6 *members of the College Republicans may act in a similar manner toward any*
7 *protesters present during the Patriot Prayer event, requiring UWPD to protect*
8 *the College Republicans and its supporters.*⁵

9 (Emphasis added.) The “group of protesters” was the radical Marxist IWW, an anti-
10 capitalist, socialist labor union known for its long history of violent demonstrations. It
11 was one of its members who was shot at the Milo Yiannopolous event at UW the prior
12 year. The group, whose name Vinson dare not mention, wasn’t assembling to rally,
13 protest or engage in any other activity that could have been more accurately described,
14 but was there congenially, one must surmise, “commemorating the shooting of a
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18 ⁵ Had he couched it differently, it might have looked something like this:

19 On January 20, 2018, a group of protesters gathered in Red Square, unsponsored.
20 Officer X confronted an individual who appeared to be the leader of the protest
21 and inquired into whether the group had been granted a permit to occupy the
22 square. Officer X learned from this individual that the group had not obtained
23 the required permission under our protocols and were there to protest by
24 shouting into a bullhorn, thereby disrupting activity in the neighboring building.
25 He additionally learned that the group was there to demonstrate in support of
26 the shooting victim at the Milo Yiannopoulos event, a member of their group.
27 Members of the College Republicans set up a table elsewhere in Red Square.
Officer X observed members of the protesting group approach the table shouting
invectives, threatening the student group and inciting violence. As it appeared
that violence would break out, UWPD intervened. We expect protesters to
behave the same way at the Patriot Rally.

1 colleague.”⁶ By their presence, the College Republicans, not the illegal occupiers, were
2 presumed responsible for creating a volatile situation.

3 Carr’s declaration is equally subtle and deceptive, suggesting a bias against
4 Patriot Prayer, Proud Boys, and, by extension, the College Republicans with
5 descriptions derived from two of the Internet’s most unreliable sources, Wikipedia,⁷ and
6 the extreme left-wing Southern Poverty Law Center (“SPLC”). Of the two, the SPLC is
7 the most unreliable, targeting “hate groups” that include Christians and churches
8 merely based on their traditional views of marriage and sex. *See* Becker Decl., ¶ 3, Exh.
9 1 (letter to media re unreliability of use of biased SPLC).

12 UW witness Christopher Jaross refers to an individual named “Tiny” associated
13 with Patriot Prayer leaving the designated area for the Patriot Rally and approach the
14 counter-protesters, creating “the potential for violence,” (Dkt. No. 36, ¶ 9) but says
15 nothing of the hundreds of masked, black-clad anarchist protesters threatening to
16 commit violence. *See* Swanson Decl., ¶ 4 (Patriot Rally crowd estimate 50-75 people;
17 protesters in the hundreds, many clad in all black attire and wearing masks; video and
18 photos of Tiny and protesters).

21 This evidence accomplishes the opposite of what UW hopes to demonstrate by
22 exposing an lack of objectivity marked by a selective choice of anecdotes, words and
23

24 ⁶ The shooter, a woman, claimed to have shot the individual in self-defense. A criminal
25 action in the matter is pending.

26 ⁷ Wikipedia invites all users—not just experts—to edit any page or to create new pages within the wiki
27 Web site. <https://en.wikipedia.org/wiki/Wiki>. Thus descriptions on Wikipedia are often skewed
toward the author(s) particular bias.

1 phrases; the use of unreliable and biased Internet sources, including the smear merchant
2 SPLC; essential facts omitted; uninformed assumptions; and a lack of scrupulousness.

3
4 C. Defendants' Equal Protection Argument Fails

5 Defendant's equal protection argument fails because Red Square is a public
6 forum, traditional or designated, and because, even if the medium level of scrutiny is
7 applied, the UW enhanced security fee policy places an unreasonable burden on
8 Plaintiffs' free speech rights. Discrimination of speech "is subject to the strictest scrutiny
9 under both the First Amendment and the Equal Protection Clause of the Fourteenth
10 Amendment." *Center for Bio-Ethical Reform, Inc. v. City and County of Honolulu*, 345 F.
11 Supp.2d 1123, 1137 (D. Hawaii 2004). Because the remaining aspects of Plaintiffs' case –
12 equal protection claim and request for injunctive and declaratory relief – are dependent
13 upon their First Amendment theory, the above analysis applies equally to the entire
14 case.
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16

17 **CONCLUSION**

18 It is clear that Plaintiffs' exercise of their rights of free speech and association are
19 chilled due to actual past enforcement and future threats of enforcement. The
20 challenged enhanced security fee policy is unconstitutional facially and as applied
21 during the Freedom Rally. Plaintiffs are likely to prevail on the merits by establishing
22 the unequal and unfair enforcement of its policy in charging them fees based on the
23 number of police required to put down the uprisings of a hostile mob Plaintiffs are not
24 responsible for inciting.
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1 DATED this April 2, 2018

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27 I hereby certify that on this 2nd day of April, 2018, I electronically filed the
foregoing document with the Clerk of the United States District Court using the
CM/ECF system which will send notification of such filing to all parties who are
registered with the CMECF system.

1 DATED this 2nd day of April, 2018

2 By: /s/ William J. Becker, Jr.
3 William J. Becker, Jr. (Pro Hac Vice)
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